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86-372

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, CHARLIE GREENE, and U.S. FIDELITY & GUARANTY CORP.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED *

1. Whether the rights vested in "members" by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") extend to persons who at one time were, but no longer are, employed in a workplace represented by a union, and who therefore do not meet the union's standards for retention of membership, but who have not been formally "expelled" by the union from membership.

2. If so, whether § 501(b) of the LMRDA, 29 U.S.C. § 501(b), to that extent violates Article III of the Constitution of the United States by conferring authority to sue derivatively, on behalf of a union, upon persons who do not have a personal stake in the outcome of the litigation.

3. Whether, consistent with § 501(b) of the LMRDA, which authorizes a court to "allot a reasonable *part of the recovery* . . . to pay the fees of counsel," a court may enter a fee award against a non-party union that is three times the amount that has been recovered for the union's benefit. More specifically:

(a) Whether, under the doctrine of *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), the express fee provision in § 501(b) precludes judicially-created "common benefit" fee awards that exceed the amount of the recovery;

(b) If common benefit fee awards in § 501(b) cases are not wholly foreclosed, whether in a case where the sole

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* There are no parties to this action except those listed in the caption. Messrs. Bryan, Comer, Bullard and Greene, who are listed as respondents on this petition, have filed their own petition for writ of certiorari seeking review of the decision below, which is pending as No. 85-2077. U.S. Fidelity & Guaranty Corp., although a party below and listed as a respondent herein, has no stake in the resolution of the instant petition, in light of its exoneration by the court below (App. 20a-21a)—an exoneration that is not challenged in this Court.

relief obtained on the merits is a monetary recovery, a common-benefit fee exceeding the amount of that recovery may be awarded on the sole premise that the outcome of the lawsuit will create a precedent that should serve as an incentive for a party to change its ways in the future in order to avoid similar lawsuits—a proposition that would render the "common benefit" doctrine indistinguishable from the "private attorney general" doctrine.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
I. THE "MEMBER" ISSUE	9
A. The Meaning of the Term "Member" in the LMRDA	10
B. The Constitutional Question	14
II. THE ATTORNEYS FEE ISSUE	15
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page
Allen v. Wright, 468 U.S. 737 (1984)	14
Alvey v. General Electric Co., 622 F.2d 1279 (7th Cir. 1980)	6, 9
Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975)	19, 23
Bakery & Confectionery Workers Int'l v. Ratner, 335 F.2d 691 (D.C. Cir. 1964)	17
Brennan v. Independent Lift Truck Builders Union, 490 F.2d 213 (7th Cir. 1974)	9
Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967)	8, 15, 18-20, 23
Hall v. Cole, 412 U.S. 1 (1973)	19
Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)	15
Head v. Brotherhood of Railway, Airline & Steamship Clerks, 512 F.2d 398 (2d Cir. 1975)	17
Highway Truck Drivers & Helpers Local 107 v. Cohen, 220 F. Supp. 735 (E.D. Pa. 1963)	17
Kerr v. Shanks, 466 F.2d 1271 (9th Cir. 1972)	17
Linda R.S. v. Richard D., 410 U.S. 614 (1973)	15
Local No. 92, Int'l Assn. of Ironworkers v. Norris, 383 F.2d 735 (5th Cir. 1967)	17
Monzillo v. Biller, 735 F.2d 1456 (D.C. Cir. 1984)	17
Piper v. Chris-Craft Industries, 430 U.S. 1 (1977)	10
Sabolsky v. Budzanoski, 457 F.2d 1245 (3rd Cir.), *cert. denied*, 409 U.S. 853 (1972)	17
Shimman v. Local 18, International Union of Operating Engineers, 744 F.2d 1226 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1191 (1985)	9, 15, 21
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)	14
Steelworkers v. Sadlowski, 457 U.S. 102 (1982)	13
Taylor v. Great Lakes Seamen's Union, Local 5000, 701 F.2d 590 (6th Cir. 1983)	9-13
Usery v. Local 639 Teamsters, 543 F.2d 369 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977)	17

TABLE OF AUTHORITIES—Continued

Page

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 14
Warth v. Seldin, 422 U.S. 490 (1975) 14, 15

Constitution and Statutes

Constitution, Article III 10, 14-15
28 U.S.C. § 1254(1) 2
Labor-Management Relations Act of 1947, Sec. 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) 13
Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 et seq.:
Section 3(o), 29 U.S.C. § 402(o) 2, 5-6, 10-14
Section 101(a)(5), 29 U.S.C. § 411(a)(5) 13-14
Section 501(b), 29 U.S.C. § 501(b) ..... *passim*
Section 501(c), 29 U.S.C. § 501(c) 4

Legislative Materials

104 Cong. Rec. (1958) 16
105 Cong. Rec. (1959) 13, 16
H. Rep. No. 741, 86th Cong., 1st Sess. 45 (1959) 16
NLRB, *Legislative History of the LMRDA* (1959) 16

Miscellaneous

Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819 (1960) 16

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ELBERT ERKINS, SAMUEL DENSON, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, CHARLIE GREENE, and U.S. FIDELITY & GUARANTY CORP.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Elbert Erkins, et al. v. Billy Bryan, et al.*, 785 F.2d 1538 (11th Cir. 1986).

OPINIONS BELOW

The initial opinion of the United States District Court for the Middle District of Alabama (hereinafter "the District Court") is reported at 494 F. Supp. 732, and is reprinted in the separately-bound Appendix to this Petition ("App.") at 53a-61a. The District Court's opinion denying reconsideration is reported at 494 F. Supp. 737, and is reprinted at App. 62a-65a. The opinion of the

United States Court of Appeals for the Eleventh Circuit reversing and remanding for further proceedings is reported at 663 F.2d 1048, and is reprinted at App. 40a-51a. The order of the Eleventh Circuit denying rehearing, and amending the opinion, is reprinted at App. 52a. A petition for writ of certiorari to review that decision was denied, 459 U.S. 989. The opinion of the District Court on remand is reported at 598 F. Supp. 240, and is reprinted at App. 23a-39a. The opinion of the Eleventh Circuit affirming is reported at 785 F.2d 1538, and is reprinted at App. 1a-21a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 8, 1986 (App. 22a). On July 1, 1986, Justice Powell signed an order extending the time to file a petition for writ of certiorari to and including July 28, 1986. On July 17, 1986, Justice Powell signed an order further extending the time to file a petition for writ of certiorari to and including September 5, 1986. (These orders bore the number A-1017.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of Sections 3(o) and 501(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 402(o), 501(b), are reprinted in the Appendix at 66a-67a.

STATEMENT OF THE CASE

Petitioner (hereinafter "USWA") was the exclusive bargaining representative of the 300 production and maintenance employees at the Eufala, Alabama, plant of American Buildings Company. To assist in performing its representational functions, USWA chartered a local union—Local 7326 ("the Local"). The Local's member-

ship consisted exclusively of the employees at that one plant.

In December, 1976, the employees at the plant struck for a new contract. The strike was not successful, and after eighteen months, a combination of strike replacements and returning strikers voted in an NLRB election to decertify USWA as bargaining representative.

USWA's Constitution extends membership only to those "employed in . . . a[] . . . place within the jurisdiction of the International Union." With the decertification, the employees of the Eufala plant ceased being eligible for membership in USWA. Perforce, they no longer were obligated to pay dues to USWA, and in fact stopped paying dues. The Local became dormant.

In December, 1979--seventeen months after USWA's decertification—USWA received a letter from Thomas Jacobson, who stated that he was an attorney representing some of the former employees at the Eufala plant. The letter alleged that during the strike four other former employees at the plant, who had been officers of the Local, had misappropriated monies from USWA's Strike and Defense Fund.[1] In a follow-up letter the next month, Jacobson demanded that USWA file suit against the alleged wrongdoers seeking recovery of the misappropriated funds, asserting that his clients would do so if USWA did not.

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[1] During the course of the strike, USWA, in accordance with its standard procedures, sent monies from its International Strike and Defense Fund to the Local. These monies were placed in a special local strike fund account by the Local and were to be used to aid strikers in need of financial assistance and to pay costs incurred by the Local (or its officers or members) in the conduct of the strike, such as the cost of publicizing the strike or of mounting a boycott of the Company's products. Any assets remaining in the Local's strike fund account at the conclusion of the strike were to be returned to USWA's Strike and Defense Fund. Accordingly, the victim of any misappropriations would be USWA, not the Local.

USWA determined that the most cost-effective way to detect any misappropriation and secure recovery was to turn the matter over to the United States Department of Labor ("DOL") for investigation, pledging USWA's full cooperation to DOL.[2] If DOL found wrongdoing, USWA would be able to recover all losses under its "Labor Organization Bond" without having to incur the expense of litigation—a procedure USWA had successfully followed in two prior instances.

On May 1, 1980, while the DOL investigation was in progress,[3] Jacobson's clients (respondents Erkins and Denson) commenced this action against the alleged wrongdoers (respondents Bryan, Comer, Greene and Bullard) seeking to recover for USWA the money allegedly misappropriated. The action was brought pursuant to § 501(b) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 501(b), which, under specified circumstances, authorizes a union "member" to sue derivatively on behalf of his union to recover union assets that have been misappropriated.

USWA, although not a party to the lawsuit, intervened for the limited purpose of challenging the plaintiffs' standing to institute the suit. USWA contended that the plaintiffs had ceased being "members" of USWA nearly two years before, when USWA was decertified, and thus could not institute a derivative action which § 501(b) made available only to union members. Plaintiffs, although conceding that they were no longer members of USWA at the time suit was filed, contended that

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[2] The LMRDA, in addition to authorizing civil actions for the recovery of misappropriated funds, 29 U.S.C. § 501(b), makes such misappropriations a criminal offense, 29 U.S.C. § 501(c). Thus, DOL has authority to investigate allegations of misappropriation.

[3] The DOL investigation concluded in November, 1981, with the indictment of the alleged wrongdoers. On February 26, 1982, they were acquitted of all charges following a five-day jury trial.

it was sufficient that they had been members at the time the alleged misappropriations had occurred.

The district court agreed with USWA that plaintiffs could not maintain this action. It found that plaintiffs had ceased to be members of USWA following USWA's decertification, and it held that suits may be maintained under § 501(b) only by persons who are members at the time of filing suit (App. 56a-61a). The court reasoned (App. 59a):

> The plaintiffs in the instant suit . . . may be viewed as in the same position as a plaintiff who seeks to bring a shareholder derivative suit after he has sold his stock in the corporation. He may have owned his stock at the time of the alleged wrong, and he may have been derivatively injured by such wrong, but essential to his being allowed to bring the shareholder suit for the benefit of the corporation is that he be a shareholder at the time of filing suit. 7A C. Wright & A. Miller, *Federal Practice and Procedure*, 325 (1972); 19 Am. Jur. 2d, *Corporations*, § 559. A complete victory in this case by the plaintiffs will be of no tangible benefit to the plaintiffs since they are not members, and a recovery for the USW will not be to their benefit, derivatively or otherwise. Conversely, a loss of this case will in no way be of any tangible detriment to them, derivatively or otherwise.

The district court accordingly withdrew leave to file the complaint—leave that is required as a prerequisite to maintaining a suit under § 501(b) (App. 61a).

Plaintiffs appealed, and the United States Court of Appeals for the Eleventh Circuit reversed and reinstated the complaint. The court reasoned that regardless whether plaintiffs were still members within the meaning of USWA's Constitution, they were still "members" within the contemplation of the LMRDA. The court reached that conclusion by construing the definition of "member" in § 3(o) of the LMRDA, 29 U.S.C. § 402(o), to mean

that an individual who once qualifies for union membership becomes a member for life, unless, thereafter, "one of two events occur: (1) the member voluntarily withdraws from the union or (2) the union expels or suspends the member after 'appropriate proceedings' held pursuant to lawful constitutional or bylaw provisions" (App. 46a-47a, quoting and following *Alvey v. General Electric Co.*, 622 F.2d 1279, 1284 (7th Cir. 1980)). As neither event had occurred here, plaintiffs were still "members" for LMRDA purposes, and could maintain this action even though they had no stake in its outcome:

> It is . . . not necessary that the petitioners in such an action as this have any personal stake in the outcome of the litigation. If the petitioners are members [under § 3(o)], the law says they have standing to conduct litigation. [App. 45a].[4]

The suit was thus remanded to the district court for trial of plaintiffs' charges that the defendants had misappropriated strike funds. USWA—whose limited intervention was exhausted with the resolution of the "member" issue—was not a party to the litigation on the merits, and did not participate at the trial. After a three-day trial, the district court determined that the defendants had misappropriated $14,461.30, and ordered that they pay that amount to USWA. That was the sole relief awarded in the suit.

Plaintiffs thereupon filed an application for an award of $305,000 in attorneys' fees, *and asked that the fees be awarded against USWA.* USWA intervened once again, this time to resist the fee award.[5] USWA acknowledged that, as § 501(b) expressly provides, the court could "allot a reasonable part of the recovery . . .

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[4] USWA sought certiorari from this interlocutory ruling, which was denied, 459 U.S. 989 (1982).

[5] USWA also renewed its contention that plaintiffs were not "members" entitled to prosecute this § 501(b) action.

to pay the fees of counsel prosecuting the suit," but, USWA contended, the court had no authority to shift fees except as thus authorized. USWA pointed out that the demand for an award against USWA exceeded the statutory authorization in two respects: (1) it sought an award from USWA irrespective of whether USWA actually recovered from the defendants (who claimed to be judgment-proof), and (2) it sought an amount far exceeding what USWA would recover even if defendants paid in full.

The district court ultimately entered an order requiring USWA to pay $42,000 in fees to plaintiffs' attorneys —three times the amount of the misappropriations the court had ordered be returned to USWA. The court reasoned that despite the language of § 501(b), fee awards "may exceed the monetary recovery in cases where plaintiffs obtain[] a favorable, non-monetary benefit for the union" (App. 30a). Here, the court found, there were two such benefits: the suit demonstrated that USWA's "elaborate system" for auditing strike funds to prevent misappropriation by local union officials had not worked in this instance (*id.*), and the suit taught USWA that if it did not itself sue alleged wrongdoers it would be obliged to pay the fees of outside counsel who did so on USWA's behalf (App. 31a).[6]

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[6] The court found the first of these "benefits" notwithstanding the undisputed evidence, introduced by USWA, that its auditing system had been overwhelmingly successful in preventing misappropriations generally; that the only reason the system had not caught the misappropriations here was that the USWA auditor assigned to this local had been terminally ill and thus had been unable to perform the audit; that, in any event, after the misappropriations here but a year before USWA learned of them, USWA coincidentally had altered its monitoring system in a manner that would prevent a recurrence of the wrong that had occurred here; and, finally, that this suit and its outcome would not prompt USWA to change the monitoring system already in place.

The second "benefit"—USWA's learning the value of suing wrongdoers itself—was at least quixotic, given the district court's simul-

USWA appealed the fee award, and the Eleventh Circuit affirmed. The court deemed itself bound by its prior holding that plaintiffs were statutory "members" entitled to maintain this action (App. 4a-5a). And the court ruled that a non-party union can be made to pay fees to the plaintiffs' lawyers in a § 501(b) action even though the fees exceed the amount of the recovery and even though the union has not received the recovery (App. 14a). Declaring that "[t]he better guide to statutory construction here is Congress's ultimate purpose in legislating, not its 'plain language'" (App. 16a), the court rejected USWA's contention that the express fee provision in § 501(b)—authorizing the trial court to "allot a reasonable *part of the recovery* . . . to pay the fees of counsel prosecuting the suit" (emphasis added)—foreclosed a fee award against the union exceeding the amount of the recovery. The court reasoned that the union's reliance on *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), was misplaced. While *Fleischmann* "holds that where Congress has set out a detailed scheme of remedies for a statutory cause of action, courts may not expand those remedies" by making common benefit fee awards, "[t]he remedies provided under § 501 of the LMRDA do not approach the specificity of those considered in *Fleischmann*" (App. 14a). In particular, "[n]otably omitted" from the statute considered in *Fleischmann* was "any reference to attorney fees," whereas § 501 of the LMRDA "provides for an award of attorney fees" (App. 15a).

Fees exceeding the recovery thus could be awarded, under the common benefit rule, if the suit conferred "[s]ubstantial non-monetary benefits" upon USWA (App. 18a). While the existence of such benefits here was not

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taneous findings that (1) the maximum amount conceivably at issue in the misappropriation claim was $50,000 (App. 36a), and (2) the fees reasonably required to recover the misappropriations were between $95,000 and $100,000 (App. 34a).

"obvious," the district court was "not clearly erroneous" in finding the two that it did (*id.*). The court of appeals recognized that "the Sixth Circuit . . . has refused to shift fees in just this sort of case because the benefit, in its opinion, is no different from results achieved under the private attorney general theory" (App. 19a, referring to *Shimman v. Local 18, International Union of Operating Engineers*, 744 F.2d 1226 (6th Cir. 1984)), but "[w]e decline to apply *Shimman* to this case" (App. 19a).

REASONS FOR GRANTING THE WRIT

The Court below has made two central rulings, on each of which there is a conflict among the Circuits, and one of which also conflicts with a decision of this Court. These rulings involve questions that arise with frequency in the lower courts, and the resolution of these questions is thus of great practical importance.

I. THE "MEMBER" ISSUE

Virtually every industrial union limits its membership to those employed in the workplaces that the union represents. Only persons employed in such workplaces are eligible to *join* the union, and eligibility to *remain* a member ceases when either that employment ends or the union's status as bargaining representative ends. The court below, and the Seventh Circuit,[7] have held that even though that may be what the *union* prescribes, a person who once becomes a union member remains a "member" for purposes of exercising the rights accorded to "members" in the LMRDA unless and until either he voluntarily resigns from the union or the union institutes formal proceedings to expel him. That construction of the LMRDA is in square conflict with the Sixth Circuit's decision in *Taylor v. Great Lakes Seamen's Union, Local*

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[7] *Alvey v. General Electric Co.*, 622 F.2d 1279 (7th Cir. 1980); *Brennan v. Independent Lift Truck Builders Union*, 490 F.2d 213 (7th Cir. 1974).

5000, 701 F.2d 590 (6th Cir. 1983), and with the clearly manifested intent of Congress. What is more, its effect, as the court below acknowledged, is to vest the power to bring § 501(b) actions in persons who do not have "any personal stake in the outcome of the litigation," and the construction thus places the LMRDA in conflict with Article III of the Constitution.[8]

The practical implications of the decision below are enormous. Because of the high rate of turnover within workforces, the large number of permanent plant closings, and the less frequent (but not uncommon) decertification of unions, vast numbers of workers move out of the jurisdiction of industrial unions and cease having any continuing stake in those unions' affairs. Yet, unless those unions were to institute prohibitively expensive (and meaningless) proceedings to "expel" such persons from membership, under the decision below those persons will continue to enjoy all the rights of "members" under the LMRDA: *e.g.*, to attend union meetings, to vote in union elections, or, as here, to bring derivative actions on the union's behalf. In a union like USWA, there are literally millions of these phantom "members," and they dwarf in number those who are the true members of the union, *i.e.*, those who continue to work in workplaces represented by USWA.

A. The Meaning of the Term "Member" in the LMRDA

Section 3(o) of the LMRDA, 29 U.S.C. § 402(o), defines "member" as

> any person [1] who has fulfilled the requirements for membership in [a labor] organization, and [2] who neither has voluntarily withdrawn from mem-

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[8] The union unsuccessfully sought certiorari on this issue at an interlocutory stage in this litigation. That, of course, does not preclude the renewed presentation of the issue upon final resolution of the litigation. *See, e.g., Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977). At the time of the earlier petition, *Taylor* had not yet been decided, and there was not then a conflict in the Circuits.

> bership nor has been expelled or suspended from membership after appropriate proceedings.

The court below based its decision on what it termed "the precise language" of this section (App. 46a). The court read the language to mean that if a person at any time in history "has fulfilled the requirements for membership" that person becomes a member for life, subject only to two conditions subsequent—voluntary withdrawal from membership or expulsion/suspension after appropriate proceedings. That is also the reading of the Seventh Circuit (see p. 9, n.7, *supra*).

But the language of § 3(o) is equally susceptible of a different reading: that *at a given point in time* a person is a union member if (1) he has fulfilled the requirements for union membership (such as working within the the union's jurisdiction or the union's trade) and (2) has not withdrawn or been expelled or suspended from the union. Under this latter reading of § 3(o), the first clause allows a union to define the class of persons who, at any particular point in time, are eligible for membership in the union, and the second clause excludes from membership certain persons who fall within that class but who have elected to withdraw from the union or whose membership has been terminated or suspended by the union (following "appropriate proceedings") for other reasons.

The Sixth Circuit has understood the latter to be the proper reading of § 3(o). In *Taylor*, a case that like this one involved USWA, the Sixth Circuit first quoted the pertinent provision (Article III) of USWA's Constitution:

> All working men and working women . . . *employed* in and around . . . mills, factories and establishments, or in any other place now or hereafter *within the jurisdiction of the International Union* . . . are eligible to membership." [701 F.2d at 591; emphasis inserted by court.]

The Sixth Circuit then described the dispute between the parties:

> The International interprets Article III to mean that employment within the union's jurisdiction is both a prerequisite to *and* a continuing condition of membership.
>
> * * *
>
> The appellants, on the other hand, contend that the language of section 3(o) of the LMRDA prohibits the union from premising "membership" on *continued* employment. . . . According to appellants, this provision guarantees continued union membership to anyone who has *once* fulfilled the threshold requirements and who has neither "voluntarily withdrawn" nor been "expelled after appropriate proceedings." [*Id.* at 591; emphasis in court's opinion.]

The Sixth Circuit resolved this dispute as follows:

> We have reviewed appellants' arguments carefully, but find them unpersuasive . . .
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> * * *
>
> [W]e find nothing in the LMRDA or its legislative history to indicate that Congress intended the "has fulfilled the requirements of membership" language of section 3(o) to be a guarantee of *continued* membership to ex-employees like the appellants. On the contrary, the floor debates establish conclusively that Congress was determined to preserve the right of a labor organization "to prescribe its own rules with respect to the acquisition and *retention* of membership." 29 U.S.C. § 158(b)(1)(A). [*Id.* at 592; emphasis in court's opinion.]

The words of § 3(o) thus are susceptible to two different readings, and there is a conflict among the Circuits as to which reading is correct.[9] And the Sixth Circuit,

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[9] The Sixth Circuit in *Taylor* noted that the case before it was distinguishable on its facts from the cases decided by the Seventh Circuit, in that the appellants in *Taylor* had voluntarily relinquished

unlike the court below, found its way to the correct construction by looking to the legislative history, as we show in the margin.[10]

The Sixth Circuit's reading of § 3(o) also comports with the overall objectives of the LMRDA. As that court stated, "we see nothing 'unreasonable' about a rule which, in effect, guarantees that internal union affairs will be governed by those whose interests are most at stake—workers presently employed in the steel industry." *Taylor*, 701 F.2d at 592. The contrary construction of the court below would commit the union's decisionmaking largely to persons who lack a current stake in those decisions—a result at odds with the legislative intent recounted by this Court in *Steelworkers v. Sadlowski*, 457 U.S. 102, 115-19 (1982).[11]

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their employment, while in the Seventh Circuit cases the loss of employment was involuntary. 701 F.2d at 592. That factual distinction, however, does not diminish the conflict in the Circuits' construction of the language of § 3(o).

[10] As the Sixth Circuit recognized, Congress, twelve years before enacting the LMRDA, had enacted § 8(b)(1)(A) of the Labor-Management Relations Act of 1947, which expressly conferred on unions the right to prescribe their own rules respecting "the acquisition *and retention* of membership therein" (emphasis added). And in the debates over the LMRDA, both of the principal co-sponsors of the LMRDA expressly declared that the LMRDA did not alter that right. Representative Landrum, citing § 8(b)(1)(A), explained that Congress did

> not here seek to repeal that. We do not here withdraw or take away from the unions the right to fix their own rules for the acquisition or *retention* of membership. [105 Cong. Rec. 15722 (1959); emphasis added.]

Representative Griffin confirmed that understanding:

> The labor reform legislation . . . does not touch or deal in any way with the admission to, or *retention of*, membership in a union [*id.* at 15722-23, emphasis added].

No Senator or Representative expressed a contrary intent, or contrary understanding of the import of § 3(o).

[11] The correctness of the Sixth Circuit's construction is confirmed—and the error of the decision below further exposed—by an

B. The Constitutional Question

If the decision below were a correct construction of § 3(o), then the LMRDA would be in irreconcilable conflict with Article III of the Constitution. For as the court below recognized, its construction of "member" vests the power to bring § 501(b) derivative actions in persons who do not have "any personal stake in the outcome of the litigation" (App. 45a). The court found this no problem, reasoning that Congress, by declaring these persons members, "says they have the standing to conduct litigation" (*id.*).

But as this Court has repeatedly held, a personal stake in the outcome is a *constitutional* prerequisite for standing to litigate in the federal courts. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472-74 (1982); *Allen v. Wright*, 468 U.S. 737, 750-52 (1984). While Congress can legislate away the *pruden-*

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examination of § 101(a)(5) of the LMRDA, 29 U.S.C. § 411(a)(5). That section governs the procedures that unions must follow in "expel[ling]" members; it would be directly applicable if the court below were correct in its conclusion that the only way a union can remove from "member" status those no longer within its jurisdiction is to "expel" them. Yet it is apparent from the face of § 101(a)(5) that Congress did not intend to require unions to resort to expulsion when an individual leaves the jurisdiction of the union. Rather, § 101(a)(5) was enacted on the understanding that expulsion was a means used only for disciplining for misdeeds those who would otherwise continue to fit within the union's definition of membership: § 101(a)(5) is entitled "Safeguards against improper disciplinary action"; it applies to proceedings to "fine[], suspend[], expel[], or otherwise discipline[]" union members; and the procedures it requires—for example, notice of "written specific charges" and "a reasonable time to prepare [a] defense"—make sense only in the context of disciplinary proceedings involving those who but for misconduct would meet the union's requirements for continued membership.

tial limitations on standing, it cannot by legislation confer standing where the *constitutional* prerequisites are absent. *Warth v. Seldin, supra*, 422 U.S. at 501.

Nor is this a case in which "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . .' " *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982), quoting *Warth v. Seldin, supra*, 422 U.S. at 500, in turn quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, n.3. (1973). The cause of action created by § 501(b), like the derivative shareholder action upon which it is modelled, is to protect the entity's treasury from being wrongfully squandered. All who have a stake in the entity's treasury thus have standing. But it was expressly found in this case that plaintiffs do *not* have a stake in USWA's treasury (App. 59a)—that is, indeed, the reason for the acknowledgment in the opinion below that plaintiffs lack a "personal stake in the outcome of this litigation."

II. THE ATTORNEYS FEE ISSUE

The court below has required USWA—which was not a party to this litigation—to pay a fee to plaintiffs' attorneys that is three times the amount those attorneys have recovered for USWA's benefit. That holding is in open defiance of the language of § 501(b) and the legislative intent, and is inconsistent with this Court's decision in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). The decision, moreover, is in conflict with the Sixth Circuit's decision in *Shimman v. Local 18, International Union of Operating Engineers*, 744 F.2d 1226 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 1191 (1985), which, as the court below acknowledged, "refused to shift fees in just this sort of case" (App. 19a). And, the decision achieves a result that is precisely the opposite of what Congress sought to accomplish in enacting § 501(b)—a result that squanders, rather than protects, the assets of unions.

A. Section 501(b) contains an express provision respecting awards of fees:

> The trial judge *may allot a reasonable part of the recovery* in any action under this subsection to pay the fees of counsel prosecuting the suit . . . [Emphasis added].

This wording is not inadvertent. Before its adoption, the Senate had defeated a proposed amendment that would have authorized the plaintiff in such a suit "to recover *from the labor organization* his costs and *a reasonable attorney's fee* . . ." 104 Cong. Rec. 11135-49 (1958) (emphasis added). From the time the "reasonable part of the recovery" language was first proposed until the time of its adoption, every explanation of its meaning was consistent with its literal words.[12]

Indeed, so clear was this understanding that it prompted Senator Goldwater to lament that § 501(b)'s fee mechanism "may defeat one of the purposes of the provision, namely, to facilitate member actions to enforce the duties and responsibilities imposed by the bill." 105 Cong. Rec. 16489 (1959). But Senator Goldwater's proposal to "avoid the problem"—substitution of a provision that would authorize the trial court to allow "in addition to any judgment . . . a reasonable attorney's fee" [13]—was not adopted.

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[12] See, *e.g.*, 104 Cong. Rec. 11327 (Sen. Ervin); *id.* at 11328 (Sen. Javits); 105 Cong. Rec. 6529 (Sen. Javits); *id.* at 15549 (Rep. Elliott); H. Rep. No. 741, 86th Cong., 1st Sess. 45 (1959). See also, Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 828 (1960).

[13] Senator Goldwater advocated "use of the same language as in other comparable provisions" of the House bill, 105 Cong. Rec. 16489, and the provisions to which he referred authorized trial courts to allow "in addition to any judgment . . . a reasonable attorney's fee." I NLRB, *Legislative History of the LMRDA* (1959), at p. 657.

Further evidence that Congress did not contemplate fee awards against unions (as distinct from fee awards out of "the recovery") is that § 501(b) does not authorize the plaintiff to join the union as a party.[14] It is hardly conceivable that, had Congress intended fee awards against unions, it would not have provided for their joinder in § 501(b) actions.

That Congress resisted proposals that would have allowed fee awards exceeding the recovery is hardly surprising. The whole purpose of a § 501(b) action is to restore to the union's treasury monies that have been misappropriated. To allow fee awards exceeding the recovery would produce precisely the opposite result: not only would the misappropriated monies not be restored, but the net effect of the § 501(b) action would then be to drain still further monies from the union treasury.

In the face of clear statutory language, and clearly manifested legislative intent, the court below has ruled—as have the other lower courts that have addressed the question[15]—that fees may be awarded in § 501(b) actions directly against unions, and in amounts exceeding

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[14] The lower courts have uniformly held that, as the language of § 501(b) suggests, the plaintiff in a § 501(b) action may not name the union as a party. See, *e.g.*, *Head v. Brotherhood of Railway, Airline & Steamship Clerks*, 512 F.2d 398 n.1 (2d Cir. 1975); *Sabolsky v. Budzanoski*, 457 F.2d 1245, 1249 (3rd Cir.), *cert. denied*, 409 U.S. 853 (1972).

[15] In addition to the decision below, see *Local No. 92, Int'l Assn. of Ironworkers v. Norris*, 383 F.2d 735 (5th Cir. 1967); *Monzillo v. Biller*, 735 F.2d 1456, 1463 (D.C. Cir. 1984); *Usery v. Local 639 Teamsters*, 543 F.2d 369, 382 n.34 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977); *Kerr v. Shanks*, 466 F.2d 1271, 1277-78 (9th Cir. 1972); *Bakery & Confectionery Workers Int'l v. Ratner*, 335 F.2d 691, 696-97 (D.C. Cir. 1964); *Highway Truck Drivers & Helpers Local 107 v. Cohen*, 220 F. Supp. 735, 737 (E.D. Pa. 1963).

the recovery. The rationale of these courts is that such awards are justified by the "common benefit" exception to the American Rule against fee-shifting. But these decisions cannot be squared with this Court's holding in *Fleischmann*.

In *Fleischmann*, this Court held that the common benefit exception cannot be invoked in a statutory cause of action where Congress, in creating the cause of action, has "expressly provide[d] the remedies for vindication of the cause." 386 U.S. at 720. The prevailing plaintiff in *Fleischmann*, a suit under the Lanham Act (which contained no attorney's fee provision), sought a fee award in reliance on the common benefit exception. In holding the exception unavailable, the Court reasoned as follows:

> The recognized exceptions to the general rule were not, however, developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies. Trademark actions under the Lanham Act do occur in such a setting. For, in the Lanham Act, Congress meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed. It provided not only for injunctive relief, but also for compensatory recovery measured by the profits that accrued to the defendant by virtue of his infringement, the costs of the action, and damages which may be trebled in appropriate circumstances . . . . When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied . . . [S]everal attempts to introduce . . . a [fee] provision into the Lanham Act have failed of enactment. We therefore must conclude that Congress intended § 35 of the Lanham Act to mark the boundaries of the power to award monetary relief in cases arising under the Act. A judicially created compensatory remedy in addition to the express statutory remedies

> is inappropriate in this context. [386 U.S. at 719-21; footnotes omitted].

This case is controlled by *Fleischmann*. Here, Congress *did* include a fee provision in the statute, but it is a narrowly circumscribed provision. It authorizes an award of fees only out of "the recovery"—an authorization that does not encompass the award made here. And efforts within Congress to secure a broader fee provision failed of enactment (see p. 16, *supra*). Thus, as in *Fleischmann*, it "must [be] conclude[d] that Congress intended [§ 501(b)] to mark the boundaries of the power" to award fees in § 501(b) cases. 386 U.S. at 721.

The obligation of the courts to limit the availability of fees to those expressly authorized in § 501(b) has been made even clearer by this Court's decision in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975). The Court there emphasized the courts' duty to adhere to the particular restrictions Congress has placed upon the availability of fees in those instances where Congress has authorized them:

> What Congress has done . . . is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights. These statutory allowances are now available in a variety of circumstances, but they also differ considerably among themselves . . . Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine. [421 U.S. at 260-62; footnotes omitted].

The court below declared *Fleischmann* inapplicable because "[t]he remedies provided under § 501 of the LMRDA do not approach the specificity of those considered in *Fleischmann*" (App. 14a). But this Court has described § 501(b) as a narrowly-drawn provision which "specifically authorize[s] . . . limited remedies." *Hall v. Cole*, 412 U.S. 1, 10 (1973). And one of those "limited

remedies" is a carefully and deliberately worded provision authorizing a fee award only out of "the recovery." The existence of a specific fee provision in § 501(b) is not a ground for distinguishing *Fleischmann*, as the court below supposed (App. 15a), but rather makes this case *a fortiori* from *Fleischmann*.

Because this issue arises with frequency in § 501(b) actions (n.15, *supra*), and the lower courts' rulings have the incongruous effect of converting § 501(b) into a mechanism for depleting rather than restoring union treasuries, the apparent inconsistency with *Fleischmann* warrants this Court's attention.

B. Even on the hypothesis that § 501(b) does not foreclose common benefit awards in all cases, the holding below that entitlement to such an award existed here would warrant this Court's attention. For the court below has articulated justifications for such an award that would be applicable in *every* successful § 501(b) case. Those justifications are simply the "private attorney general" rationale dressed up with a different name. And the Sixth Circuit, in a case with which the decision below admittedly conflicts, has rejected them for that very reason.

The lone remedy in this case was an order that the defendants pay USWA $14,461.30. There was no injunction or other remedy in the case. But the court below declared that USWA's members secured two "nonmonetary" benefits from this lawsuit for which they should be made to pay a fee three times that amount: (1) the plaintiffs' victory taught USWA that its auditing controls for preventing and/or detecting misappropriations were not foolproof, and (2) USWA was shown by this lawsuit the importance of suing wrongdoers itself. The court below reasoned that this "incentive to change" (App. 19a) constitutes a lesson to USWA for which its members should pay tuition.

But these "benefits" would be conferred in every successful § 501(b) action. And as the Sixth Circuit explained in *Shimman*, 744 F.2d at 1235 n.13:

> Since there was no injunction in this case, the benefits received by other union members were achieved not by direct operation of the judgment, but rather were the result of a realization that the union would have to reform itself or risk exposure to further liability. Society as a whole always benefits through general deterrence when the law is enforced. Allowing a fee award based on such benefits, however, would come close to accepting the "private attorney general" rationale, which was rejected by the Supreme Court in *Alyeska*. The common benefit theory should not be allowed to merge into the private attorney general approach. [744 F.2d at 1235 n.13.]

As the court below acknowledged, *Shimman* "refused to shift fees in just this sort of case" (App. 19a), but the court below "decline[d] to apply *Shimman* to this case" (*id.*).

C. The decision below is not only a distortion of the "common benefit" exception, it flies in the teeth of the central objective of § 501(b): to prevent the squandering of unions' assets. For if USWA were foolish enough to "learn" the lessons that the court below thought it had been taught, the result would be financial imprudence.

USWA's decision not to sue in this case was the only economically rational choice: from the outset, it was clear that the "maximum possible recovery . . . was in the area of $50,000.00" (App. 36a)—and, of course, the actuality was a recovery less than one-third that. But the fees USWA would have had to pay to prosecute this case would have substantially exceeded $50,000, let alone the $14,460 that is all that was ultimately recovered (App. 34a). Thus if USWA learned from this case the lesson that it should always sue whenever there is reason to suspect misappropriation, regardless of the amount at

stake and without taking into account cost-benefit considerations, its members would be the clear victims. The court below recounted the union's evaluation that "the way it handled the matter instead of filing suit"—*i.e.*, invoking the Department of Labor's investigative powers—was "more beneficial to the Union" (App. 49a). Yet without declaring that evaluation inaccurate, the court below required the union to pay for the counter-lesson supposedly taught by this suit.[16]

Similarly, the lesson USWA supposed learned that its procedures for auditing strike funds are not foolproof against misappropriation—even if the supposition were not contrary to the undisputed record evidence (n.6, *supra*)—hardly means that changing those procedures would be economically rational. The undisputed evidence was that USWA's procedures have been overwhelmingly successful in assuring the safeguarding and proper expenditure of USWA funds, and the misappropriations that occurred at this now-defunct local were an aberration. In these circumstances, any alteration in procedures inevitably would carry a cost in excess of what could be saved in consequence.

It is considerations such as these that Congress must weigh in determining whether, and if so on what terms, to authorize fee-shifting in statutory causes of action. Congress' deliberate limitation of fee awards under § 501(b) to a portion of the recovery reflects that Congress did not want the central purpose of § 501(b)—the preservation of union assets—undercut by fee awards exceeding the amount of the recovery on bases such as

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[16] Of course, a union might opt to bring a seemingly economically irrational lawsuit simply to send a message to local union officers generally that misappropriations in small amounts will not be ignored. But the alternative course followed here by USWA—which resulted in the criminal prosecution of the alleged wrongdoers (see n.3, *supra*)—surely sent a stronger message, and at no cost to USWA.

those employed by the courts below. *Fleischmann* and *Alyeska* teach that those congressional judgments must be respected by the courts.

D. The combined effect of the rulings below—allowing suits such as this to be brought by persons who have no stake in the union's treasury, and authorizing fee awards that exceed the amount of the recovery—is to create a fertile breeding ground for suits motivated principally, if not solely, as attorneys' quests for fees. While, as we have shown, each of the rulings merits this Court's consideration in its own right, their conjunction represents a complete distortion of Congress' objective in enacting § 501(b): to preserve union treasuries for the benefit of the union members.

CONCLUSION

For the reasons set forth above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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